

(1991) 08 OHC CK 0007
In the Orissa High Court
Case No : Criminal Revision No. 464 of 1987

Gadadhar Pati

APPELLANT

Vs

Banshidhar Pati

RESPONDENT

Date of Decision : 01-08-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 352, 441, 447, 448, 504

Citation : (1992) CriLJ 1811

Hon'ble Judges : B.N. Dash, J

Bench : Single Bench

Advocate : A.K. Mohapatra, P.K. Patnaik and R. Ch. Patnaik, for the Appellant;
Sarat Chandra Sahoo, G.P. Ghuse and S. Naik, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Dash, J.—The appellate modifying judgment is under challenge in this revision.

2. The parties are step brothers being the sons of same father and their houses were adjacent to each other in village Katijhuri, P.S. Baisinga, district Mayurbhanj. The opposite party, as complainant, filed the complaint on 9-7-1982 alleging that there was a partition of their ancestral properties long long ago between him and the petitioner and they were in separate possession of their respective shares and that on 6-7-1982 at about 7 a.m. while the complainant was performing his routine morning duties, the petitioner approached him in a furious mood making allegation of uprooting the fence and the pillars erected by him. It was also alleged that when the opposite party replied that he had merely mend the fence, the petitioner abused him in filthy language and came rushing with a sword, which he got from his house in the meanwhile, shouting on the way to kill him and out of fear the opposite party ran in to his house being chased by the petitioner and bolted the entrance door from inside. It was further

alleged that the petitioner remained outside the door for sometime and thereafter disappeared hurling threat of killing him in the event of his coming out of the house. On the next day, the petitioner lodged information at Baisinga Police Station which was entered in the station diary (vide Ext. 1), but as per direction of the police the complaint was filed in court and cognizance of the offences punishable Under Sections 352, 504 and 448, IPC was taken.

3. The petitioner, while denying the charges, attributed prior enmity to the filing of the complaint. During his examination u/s 313 Cr. P.C. his specific defence was that the opposite party had been to Baripada to execute a registered sale deed in respect of ancestral land to which he objected and the same was the immediate cause for filing of the complaint. Two witnesses were examined on his behalf. D.W. 1 Kati Majhi was examined to say that in the year in question in the month of Shravan he worked in the land of the complainant as a labourer with P.W. 2 and others. D.W. 2 Chandramani Choudhury, the sister of the complainant was examined to say that in connection with the marriage of her son which was held on the last Wednesday of the month of Asadha last year the accused had gone to her house Dhanghar under Khunta Police Station on the preceding Monday and he had gone to Baripada on Tuesday to arrange a car for the marriage ceremony.

4. On the other hand, the opposite party-complainant examined five witnesses including himself as P.W. 4. Out of the remaining witnesses, P.Ws. 1 to 3 were examined as witnesses to the alleged occurrence and P.W. 5 was examined to prove the station diary entry (Ext. 1). On a consideration of the entire evidence on record, the trial court, while acquitting the petitioner of the charge u/s 504, IPC, convicted him Under Sections 352 and 448 IPC and sentenced him to pay a fine of Rs. 100/-, in default, to undergo simple imprisonment for seven days for the offence u/s 352, IPC and to a further fine of Rs. 200/-, in default, to undergo simple imprisonment for fifteen days for the offence u/s 448, IPC. In appeal, the conviction and sentence u/s 352, IPC were set aside and the conviction u/s 448, IPC was modified to one u/s 447, IPC and the sentence of fine of Rs. 200/-, in default, to undergo simple imprisonment for fifteen days was also modified to a fine of Rs. 100/-, in default, to undergo imprisonment for fifteen days.

5. Mr. A.K. Mohapatra, learned counsel for the petitioner has raised two substantial contentions. His first contention is that the delay in lodging the complaint having not been explained by the complainant, it was not open to the appellate court, as has been done in this case, to find out for itself the cause for the delay and on that count alone the conviction of the petitioner is unsustainable. The second contention is that the ingredients of the offence u/s 447, IPC having not been clearly established, conviction thereunder is liable to be set aside.

6. The courts below have held the evidence of the complainant (P. W. 4) as well as of all the eye witnesses (P.Ws. 1 to 3) as reliable. They have also found that the plea of alibi taken by the accused through the evidence of D.W. 2 is false and on the basis of such finding they have further held the prosecution case to have

been strengthened. They have further noticed that a part of the prosecution case has been admitted by the defence by giving a suggestion to P. W. 2, which has been stoutly denied by him, that the award held by the accused while chasing the complainant was a toy-sword being made of plastic. On a consideration of all these materials, they have believed the prosecution case resulting in the conviction of the petitioner. Keeping this in the background, the correctness of the contentions raised on behalf of the petitioner may be examined.

7. Delay in setting the law into motion by lodging of complaint in court or of first information report at police station is normally viewed by courts with suspicion because there is possibility of concoction of evidence against an accused. So it becomes necessary for the prosecution to satisfactorily explain the delay. But what would follow when there is no explanation for the delay and when there is some explanation which is found to be not satisfactory. Should the prosecution be thrown out of court only on that count even if its case is otherwise proved?

In *Ram Jag and Others Vs. The State of U.P.*, the effect of delay in filing FIR came up for consideration and therein it is held (para 11) :

Whether the delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case must depend upon a variety of factors. Even a long delay can be condoned if the witnesses have no motive for implicating the accused. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness of the version of the prosecution.

It is true that witnesses cannot be called upon to explain every hour's delay in filing information and a commonsense view has to be taken in ascertaining whether the First Information Report was lodged after an undue delay as to afford enough scope for manipulating evidence."

In *the State v. Ajati Padhan* 32 1966 C LT 494 a Bench of this Court has held that when the defence absolutely made no endeavour to elicit in cross-examination as to why delay occurred or that the delay could have been avoided, it cannot be held that the delay is fatal to the prosecution in the facts and circumstances of this case. In *Satyabedi Kar v. Harmohan Misra* 1976 C LR (Cri) 285 and in *Jagannath Mohanty v. Dr. Kshetramohan Baliar Singh* 1978 CLR (Cri) 51, some explanations had been offered by the prosecution for the delay in filing the complaint or the First Information Report as the case may be but the same were held as not satisfactory and they were considered as a circumstance while dealing with the evidence of the eye witnesses in arriving at the conclusions.

On the basis of these decisions, it cannot be said that the prosecution which is otherwise duly proved has to fail merely on the ground that there was no explanation for a little delay or the explanation for such delay is found to be unsatisfactory. All that can be said is that in such an eventuality courts have to be at guard in evaluating the entire evidence on record. Otherwise stated, the evidence of the witnesses has to be weighed with greater circumspection.

8. It is then to be found out whether there has been actual delay in this case in filing the complaint in court. As already stated above, the occurrence took place on 6-7-82 at about 7 a.m. and after the matter was reported at the police station on 7-7-1982 at about 12 noon, the complaint was filed in court on 9-7-1982. There is no evidence on record to show as to how far the court is from the village of the parties or the police station and whether there was regular transport facility connecting those places. The complainant has offered no explanation as to why he filed the complaint on the 4th day of the alleged occurrence. But the learned Sessions Judge has ignored the delay saying :

...It is common knowledge that when a person desires to lodge a complaint with regard to an offence, he ordinarily has to take the assistance of a lawyer and if the lawyer happens to be a busy practitioner, it may not be possible on the part of the lawyer to draft the petition of complaint immediately and there may be delay of one or two days. Had there been no station diary entry on 7-7-82, a delay of three days might have been of some consequence....

9. The learned counsel for the petitioner has contended that the lacuna of a party cannot be supplied by the court and in support of such contention he has placed reliance in *Dasarathi Chamar and Another Vs. Balmukunda Das and Others*, . In that case, this Court while dealing with an order of remand by an appellate court found that a party had not taken proper step for placing the material evidence on record although he had nearly one year's time and so it was held that in remanding the case the appellate court had exercised his jurisdiction with very serious and material irregularity by allowing that party to fill up the lacuna. In that context, it was further held by this Court that it was certainly not the function of the Court to fill up the latches or the lacuna in proof of the case of a party unless it was fully satisfied that there was sufficient reason which prevented the party from taking proper steps to prove his case. This decision has no application because in this case the learned Sessions Judge merely drew some conclusion on the basis of ordinary human conduct permissible u/s 114 of the Evidence Act. Be that as it may, when a station diary entry was made on the next day of the alleged occurrence, the delay of the remaining two days cannot, possibly have an adverse effect on the prosecution particularly when, as already stated above, there is no evidence to show as to what was the distance of the village of the parties or the police station from the court and whether there was regular transport facility connecting those places. So rejecting the contention raised on behalf of the petitioner, I hold that delay, if there was any, will not adversely affect the prosecution case in the facts and circumstances of the case.

10. In order to appreciate the second contention, Section 441, IPC is quoted below :

441. Criminal trespass -- Whoever enters into or upon property in possession of another with intent to commit an offence or to intimidate insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult

or annoy any such person or with intent to commit an offence, or having lawfully entered into or upon such property, remains there with the intention of taking unauthorised possession or making unauthorised use of such property and fails to withdraw from such property or its possession or use, when called upon to do so by that another person by notice in writing, duly served on him, is said to commit criminal trespass.

This section has three essentials, namely,

- (1) Entry into or upon property in the possession of another.
- (2) If such entry is lawful then unlawfully remaining upon such property.
- (3) Such entry or unlawful remaining must be with intent --
 - (i) to commit an offence; or
 - (ii) to intimidate, insult or annoy the person in possession of the property.

In *Bidyadhar Nayak v. Srimati Dei* 1972 1 C WR 982 it has been held by this Court as under :

Whether the act of trespass was merely to take possession of the land or was with the dominant intention of causing annoyance to the complainant must depend on the circumstances of the case. For this it is not sufficient to show merely that the natural consequence of the entry was likely to be annoyance, intimidation or insult and that this likely consequence was known to the person entering. In deciding as to what exactly was the dominant intention the court has to consider all the relevant circumstances including of course the presence of knowledge that its natural consequence would be such annoyance, intimidation or insult.

In *Anantaram Patnaik v. State of Orissa* 1988 OCR 538 the following observation has been made:

...It is one thing to entertain a certain intention and another to have the knowledge that one's act may possibly lead to a certain result. Before an accused is found guilty of criminal trespass, it must be proved that the dominant intention of the accused was to annoy when he made the entry and it is not enough to show that the accused must have known that such entry is bound to annoy the person in possession.

11. From the above decisions, it is clear that the prosecution for its success must prove that the dominant intention of the accused was to intimidate, insult or annoy when he made the entry. Keeping in view this legal principle, it may now be examined whether the evidence on record justifies the conviction of the petitioner u/s 447, IPC by the appellate court. There is unassailable evidence on record that the parties were in exclusive separate possession of their respective houses situated adjacently and that on the date of the alleged occurrence the petitioner chased the complainant holding a sword in his hand and shouting to

kill him and out of fear when the complainant entered into his house and bolted the door from inside, the petitioner remained for sometime near that door on the land of the complainant and then left the place terrorising the complainant that he would kill him in the event of his coming out of his house. With this proved facts, there is no escape from the conclusion that all the ingredients of the offence u/s 447, IPC have been duly established against the petitioner. There being no direct evidence of partition between the parties, it is contended on behalf of the petitioner that the exclusive ownership of the house in question has not been established and, therefore, the petitioner can hardly be said to have committed criminal trespass u/s 447, IPC. Such contention cannot be accepted because for an offence u/s 447, IPC it is the exclusive possession of the property into or upon which the trespass was committed which counts and not the ownership thereof.

12. All the contentions raised on behalf of the petitioner having, thus, failed, I find no merit in the revision which is accordingly dismissed.